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NO. 84-321

Supreme Court, U.S.
FILED
OCT 15 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA,

PETITIONER,

VS.

EARNEST JAMES STURDIVANT,

RESPONDENT.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS AND BRIEF
IN OPPOSITION TO GRANTING
PETITION FOR CERTIORARI

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OCTOBER 11, 1984

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

No. 84-321

STATE OF ALABAMA,

PETITIONER,

VS.

EARNEST JAMES STURDIVANT,

RESPONDENT.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE
BRIEF IN FORMA PAUPERIS

EARNEST JAMES STURDIVANT hereby moves, pursuant to Rule 46 of the Rules of this Court, for leave to file the attached Brief in Opposition to Granting Petition for Certiorari and all following documents, if any, In Forma Pauperis.

AS GROUNDS THEREFORE, EARNEST JAMES STURDIVANT refers to the attached Affidavit.

Respectfully Submitted,

BLANCHARD L. McLEOD, JR.
(Counsel of Record)

J. PATRICK CHESHIRE

OF COUNSEL:

McLEOD & CHESHIRE
Attorneys at Law
P. O. Box 656
Selma, AL 36702
(205) 875-2282

October 11, 1984

AFFIDAVIT

I, Earnest James Sturdivant, being first duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

   a. No.
   b. Date of last employment: October, 1981
      Amount of salary and wages per month: $536.00
   c. I have been incarcerated since: May, 1982

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

   a. No.

3. Do you own any cash or checking or savings accounts?

   a. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   a. No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   a. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Earnest J. Sturdivant
Earnest James Sturdivant

Subscribed and Sworn to before me

this 8 day of October, 1984.

Notary Public
State of Alabama at Large

My commission expires 5/26/87

NO. 84-321

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Earnest James Sturdivant, asks leave to file the attached response to the Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Respondent has previously been granted leave to so proceed in both the Circuit Court of Dallas County, Alabama, the Alabama Court of Criminal Appeals and the Alabama Supreme Court as a pauper. Respondent's affidavit in support of this motion is attached hereto.

×Earnest J. Sturdivant
Earnest James Sturdivant

ATTORNEY FOR RESPONDENT:

McLEOD & CHESHIRE
Attorneys at Law
P. O. Box 656
Selma, AL 36702
(205) 875-2282

QUESTION PRESENTED

Whether the highest court in a state has the power to render a decision as to the procedures to be followed in the courts of that state by court-appointed counsel representing an indigent criminal defendant.

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STATE OF ALABAMA,

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BRIEF IN OPPOSITION TO GRANTING PETITION FOR CERTIORARI

OPINIONS BELOW

The Respondent will refer to Appendix A, as stated in Respondent's Brief. A copy of same is attached hereto, infra.

STATEMENT OF THE CASE

A unanimous Alabama Supreme Court held that the proper procedure for applying the guidelines set out in Anders v. California, 386 U.S. 738 (1967), under the statutory law of Alabama was as follows:

1. That once an indigent defendant has expressed his desire to appeal, his court-appointed attorney is obligated to bring that appeal. Martin v. State, 277 Ala. 153, 167 So.2d 912 (1964), Hubbard v. State, 382 So.2d 577 (Ala. Crim App. 1979).

2. That upon receiving the transcript (which

can only be acquired at state expense after notice of appeal has been filed, Ala. Code Sec. 12-22-192, (1975).) counsel must make a conscientious search of the transcript and if he finds no merit in the appeal, he must file a motion to withdraw setting out his reasons for withdrawal accompanied by a brief outlining any possible points that may be argued in favor of the indigent defendant.

3. That once such a brief is filed, Alabama law dictates that the appellate court must then review the brief. Once defense counsel has complied with the requirements set out by the Alabama Supreme Court, the Court of Criminal Appeals may grant counsel's request to withdraw, however, since Alabama law requires that an appellate court must proceed to a decision on the merits of the case, Ala. Code Sec. 12-22-130, (1975), it is the duty of the appellate court to appoint substitute counsel to argue the appeal for the indigent, Ala. Code Sec. 15-12-22 (b), (1975).

The Facts

The respondent, Earnest James Sturdivant, was previously convicted of Robbery in the Second Degree and sentenced to the State Penitentiary on May 5, 1982. (T-5) On May 17, 1983, the Petition for Writ of Error Coram Nobis was filed with the trial court alleging among other things that the respondent was denied the effective assistance of counsel due to the failure of the client's court-appointed attorney to file a timely notice of appeal. (T-1-4)

At the Coram Nobis Hearing before the Hon. E. P. Russell, Jr., the respondent stated that he asked his court-appointed attorney to appeal his case. (T-5) The respondent

indicated that on three separate occasions he discussed the appeal with his court-appointed attorney plus the fact that respondent's mother called and talked with the attorney about an appeal. (R-12 & R-26)

The Hon. Robert R. Blair, the court-appointed attorney for the respondent who tried the case, indicated that he and the respondent talked on several occasions after the trial and prior to the running of the time for the filing of an appeal. (R-27) The respondent's court-appointed counsel stated that he indicated to his client that he felt, "...he had gotten a break and was convicted of robbery in the second degree. That perhaps we ought to give some consideration to whether or not we wanted to take an appeal concerning his case." (R-27)

The respondent's court-appointed counsel told his client, "...that the possibility of a successful appeal was very slim at best." (R-28) In addition, court-appointed counsel advised his client, "That if the appeal should be granted and he should be successful on appeal, the chances were extremely high that he would be brought back to Dallas County and that he would be retried and that the evidence would be the same or substantially the same as it was in his first trial. That the likelihood was great that he would be convicted and that all his efforts and all the time he had spent on appeal would be for naught." (R-28)

The Alabama Court of Criminal Appeals affirmed the trial court without opinion. Since a further attempt to obtain an opinion from the Alabama Court of Criminal Appeals upon a motion for rehearing was also denied without opinion, a Petition for Writ of Certiorari was filed with the Alabama Supreme Court.

The Alabama Supreme Court granted the Petition for Writ of Certiorari on this matter and after hearing oral arguments, the state's highest court reversed the affirmance of the trial court by the Court of Criminal Appeals and remanded the case to the appeals court for a decision consistent with the opinion of the

Alabama high court.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE ALABAMA SUPREME COURT DEALS STRICTLY WITH THE PROCEDURE THAT A DEFENSE COUNSEL FOR AN INDIGENT DEFENDANT MUST FOLLOW IN ORDER TO WITHDRAW FROM REPRESENTATION OF AN INDIGENT DEFENDANT ON APPEAL UNDER ALABAMA LAW.

The right to appeal is a state-created right that is a creature of state statutes and the procedure that governs the application of appeals, as long as it does not conflict with due process and equal protection of the law as guaranteed by the United States Constitution, is clearly the province of the state. Douglas v. California, 372 U.S. 353, (1963).

The Office of the Attorney General has overlooked in their Petition for Writ of Certiorari the fact that this case was decided under Alabama law. Quoting from page four of the opinion:

> "In Alabama, state law requires the appropriate appellate court to proceed to a decision on the merits. Code of 1975 Sec. 12-22-130, provides:
>
> > 'A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the supreme court or court of criminal appeals may appeal from the judgment of conviction to the appropriate appellate court.'
>
> Applying Anders to Alabama practice, once counsel has complied with the requirements of that case, the Court of Criminal Appeals may grant counsel's request to withdraw, but must appoint substitute counsel to argue the appeal for the indigent."

Thus, although the opinions of the United States Supreme Court have provided a certain amount of guidance to the Alabama Supreme Court, the threshold question in the instant case concerns the right to appeal as it exists under Alabama law. Therefore,

the case of Anders v. California, 386 U.S. 738 (1967), does not come into play until the threshold question of Alabama law has been reached.

II.

STRICKLAND V. WASHINGTON, __ U.S. __, 80 L.Ed.2d 674, (1984), Is CLEARLY DISTINGUISHABLE FROM THE INSTANT CASE

The Office of the Attorney General in its Petition for Writ of Certiorari relies on the case of Strickland v. Washington, U.S. __, 80 L.Ed.2d 674, 104 S.Ct. __ (1984). The Office of the Attorney General has correctly stated that this case sets the standards for judging effective assistance of counsel at trial. However, the case now before this Honorable Court on a Petition for Writ of Certiorari in no way deals with the standards for effective assistance of counsel on either the trial or appellate level. The case now at bar deals only with whether the court-appointed attorney carried out his client's wish to exercise the right to an appeal granted to every convicted criminal defendant under Alabama law. Ala. Code Sec. 12-22-130, Ala. R.A.P. 3 (a)(2). All of the major statement of facts contained in the Petition for Writ of Certiorari of the Office of the Attorney General in pages 11, 12, 13, 14 and 15, deal with the trial. This case was never presented to the Alabama Supreme Court for any consideration of what transpired prior to the sentencing of the client. The Office of the Attorney General totally fails to state in its statement of the facts that the evidence was uncontroverted by any witness, including the State's witnesses, that the said Earnest James Sturdivant requested his trial counsel to file an appeal.

III.

PREJUDICE OCCURRED WHEN RESPONDENT WAS DENIED THE OPPORTUNITY TO EXERCISE HIS STATE CREATED RIGHT TO AN APPEAL.

The Office of the Attorney General attempts to state that the omission of the trial counsel did not prejudice the Respondent. However, in Alabama the right to an appeal from a

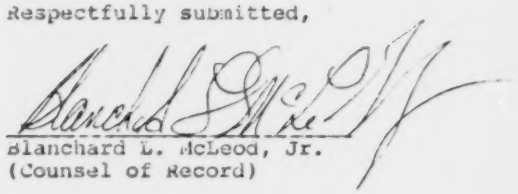
conviction of a criminal offense is wholly statutory in nature. Campbell v. State, 182 Ala. 18, 62 So. 57 (1913). Thus, should notice of appeal not be filed within the procedural time periods prescribed in Ala. R.A.P., Rule 4, the appellate courts of Alabama lose the jurisdiction to hear the appeal and the right to bring an appeal to the Alabama appellate courts is extinguished. Bryan v. Brown, 339 So.2d 577 (Ala. 1976), cert. denied, 431 U.S. 954 (1977); Tyson v. State, 361 So.2d 1182 (Ala. Crim. App. 1978); Turner v. State, 365 So.2d 335 (Ala. Crim. App.), cert. denied, 365 So.2d 336 (Ala. 1978).

Therefore, the denial of the right to appeal is presumed, as a matter of law, is not only prejudicial, but fatally so. Prejudice exists since there is a denial of a state created statutory right as well as a denial of a federal constitutional right to Due Process.

CONCLUSION

On the basis of the foregoing, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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October 11, 1984

APPENDIX

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APPENDIX A

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

Ex parte Earnest James Sturdivant

83-441

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Earnest James Sturdivant

v.

State)

BEATTY, JUSTICE.

The petitioner, Earnest James Sturdivant, was convicted of the charge of second degree robbery in the Circuit Court of Dallas County, Alabama, on May 5, 1982. He filed a petition for a writ of error coram nobis on May 17, 1983, alleging that he was denied the effective assistance of counsel due to the failure of his court-appointed attorney to file a timely notice of appeal. The trial court denied that petition. Sturdivant appealed that denial to the Alabama

Court of Criminal Appeals on September 29, 1983, and that court affirmed the trial court's judgment, without opinion. After the Court of Criminal Appeals denied his application for a rehearing, Sturdivant petitioned this Court for a writ of certiorari. We granted the writ to determine whether the Court of Criminal Appeals erred in affirming the trial court's judgment.

At the coram nobis hearing in the trial court, Sturdivant testified that he was first represented by Ed Greene. When Greene returned to his position as chief deputy district attorney of Dallas County, Robert Blair became Sturdivant's lawyer. Sturdivant testified that, after his conviction, Blair visited him at the county jail and Sturdivant told him to appeal his conviction.

Blair testified that he and Sturdivant on several occasions after the trial talked about taking an appeal. He further stated that he informed Sturdivant that "the possibility of a successful appeal was very slim at best," and, therefore, he discouraged his client from taking an appeal. He also advised his client that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree. The State's brief indicates that Blair thought that an appeal would be frivolous because, in his opinion, no error had been committed. Additionally, during the last conversation which Blair had with Sturdivant prior to the expiration of the time for appeal, Sturdivant indicated that he would "go and build his time and get it over with." Subsequently, Sturdivant told Blair he wanted to appeal, and Blair told him the time for appeal had run out.

Sturdivant asserts that he was denied the effective assistance of counsel because Blair failed to comply with the requirements of Anders v. California, 386 U.S. 738

(1967). In Anders, the Court addressed the "extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." Anders had been convicted of the felony of possession of marijuana and subsequently sought to appeal. He moved that the California District Court of Appeal appoint counsel for him. The court granted that motion, and the attorney filed a no-merit letter in the appellate court, stating:

> "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him. ... [H]e wishes to file a brief in this matter on his own behalf."

Anders then asked for the appointment of another attorney, but the court denied that request, so Anders filed his brief pro se. After the State had filed its brief, Anders filed a reply brief, following which the District Court of Appeal affirmed the conviction. The United States Supreme Court granted certiorari after the Supreme Court of California and the District Court of Appeal denied Anders's petition for a writ of habeas corpus.

The United States Supreme Court reversed and remanded the cause, stating:

> "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might

> arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." (Footnote omitted.) Anders, supra, 386 U.S. at 744.

In Alabama, state law requires the appropriate appellate court to proceed to a decision on the merits. Code of 1975, § 12-22-130, provides:

> "A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the supreme court or court of criminal appeals may appeal from the judgment of conviction to the appropriate appellate court."

Applying Anders to Alabama practice, once counsel has complied with the requirements of that case, the Court of Criminal Appeals may grant counsel's request to withdraw, but must appoint substitute counsel to argue the appeal for the indigent.

In the case at bar, the requirements of Anders were not followed. Sturdivant's statement that he would "go and build his time" did not necessarily mean that he did not wish to contemporaneously proceed with the appeal; thus his counsel was not relieved of his duty to either appeal the conviction or to withdraw from the case after following the guidelines of Anders. Due to this inadvertent failure, Sturdivant was denied the procedure set forth in Anders and, therefore, the trial court should have granted Sturdivant's petition. It also follows that the Court of Criminal Appeals erred in affirming that denial.

83-441

Accordingly, we have no option but to follow the mandate of the Anders opinion and, therefore, we must reverse the judgment of the Court of Criminal Appeals and remand this cause to that court with directions to allow petitioner an out-of-time appeal. See Longmire v. State, 443 So. 2d 1265 (Ala. 1982). It is so ordered.

REVERSED AND REMANDED.

All the Justices concur.

FILED
JUL 6 1984
CLERK
SUPREME COURT OF ALABAMA

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